SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1251

SOUTHLAND INCORPORATED,
Petitioner,

versus

COX ENTERPRISES, INC. and ATLANTA NEWSPAPERS, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS COX ENTERPRISES, INC. AND ATLANTA NEWSPAPERS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENTS COX ENTERPRISES, INC. AND ATLANTA NEWSPAPERS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are appended to this Brief (Appendices I, II), and are reported at 226 Ga. 794, 177 S.E. 2d 653, and 226 Ga. 798, 177 S.E. 2d 655.

JURISDICTION

No federal question was timely and properly raised below so as to give this Court jurisdiction to review the judgments below on writ of certiorari.

QUESTIONS PRESENTED

I. Whether a writ of certiorari should be granted where the petitioner alleges that review should be had because of a right, privilege or immunity set up or claimed under the Constitution, but where the petition for certiorari fails to show that any constitutional issue was properly raised in the courts below or passed upon by such courts?

II. If the petitioner had shown that it was entitled to review in this Court by certiorari (which plainly was not done), the questions presented would be:

(a) Whether a state statute which provides for the dismissal of appeals where there has been an inexcusable delay in the filing of the transcript caused by the appellant violates any federally protected right.

(b) Whether the application of such statute to the facts of this case where, among other things, the petitioner had inexcusably caused a delay of some thirteen months in the filing of the transcript, violates any such right.

STATUTES INVOLVED

Section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; Ga. Code Ann. §6-809(b)) provides in pertinent part as follows:

> "No appeal shall be dismissed by the appellate court nor consideration of any error therein refused because of failure of any party to cause the transcript of evidence and proceedings to be filed within the time allowed by law or order of court, but the trial court may, after notice and opportunity for hearing,

order that the appeal be dismissed where there has been an unreasonable delay in the filing of such transcript and it is shown that the delay was inexcusable and caused by such party; and in like manner, the trial court may order the appeal dismissed where there has been an unreasonable delay in the transmission of the record to the appellate court, and it is seen that such delay was inexcusable and was caused by the failure of a party to pay costs in the trial court or file pauper's affidavit."

STATEMENT OF THE CASE

These respondents deem that the following statement of the case is necessary to correct inaccuracies and omissions in the statement of the petitioner. The petitioner ("plaintiff") filed suit for injunction in the Superior Court of Fulton County, Georgia against respondents Cox Enterprises, Inc., Batson-Cook Company, and the City of Atlanta ("defendants"). Respondent Atlanta Newspapers, Inc., whose stock is owned by Cox Enterprises, Inc., was allowed to intervene as an additional defendant by consent of the parties. In its complaint, the plaintiff alleged that the defendants had poured the foundations for a building, obstructing two alleged streets, "Wall Street" and Fairlie Street. The defendants filed answers which denied the material allegations of the complaint and set forth various affirmative defenses.

After a hearing which commenced on March 28, 1969, the trial court granted summary judgment in favor of all of the defendants on April 4, 1969.

Plaintiff filed a Notice of Appeal with respect to such orders on May 1, 1969, and thereafter obtained orders

extending the time "in which to prepare the said record. . . ." The transcript of evidence and proceedings was not filed with the clerk of the trial court until May 7, 1970—almost thirteen months later. On May 8, 1970, these defendants filed a motion in the trial court to dismiss plaintiff's appeal on the ground that there had been an unreasonable delay in the filing of the transcript and such delay was inexcusable and caused by the plaintiff. After a hearing on the motion, the trial judge entered an order dated May 20, 1970, in which he found that "the delay in filing the transcript in this case was unreasonable, and inexcusable and that this delay was caused by the appellant's failure to decide to order the transcript as a whole until the Fall of 1969." The order, however, continued as follows:

> "This Court, however, recognizes the danger inherent in any statute which permits a trial court to dismiss an appeal of its own rulings. In view of this and the fact that movants failed to object to the orders of extension previously entered, as well as the fact that said case has now been docketed in the Supreme Court and assigned for argument, this Court denies the motion to dismiss the appeal."

These defendants filed a Notice of Appeal to the Supreme Court of Georgia on June 5, 1970, which in Case No. 26026 reversed the trial court and held that it should have dismissed the appeal by plaintiff. The Supreme Court of Georgia in Case No. 25917 dismissed the appeal of plaintiff, since that case was controlled by the decision in Case No. 26026. Both of these decisions of the Georgia Supreme Court are appended at the end of this Brief (Appendices I, II).

Although the merits of the injunction proceeding were

not considered by the Supreme Court of Georgia, and hence are not directly involved in the petition before this Court, a brief synopsis of the entire case follows. Atlanta Newspapers, Inc. was in the process of constructing a new building, with Batson-Cook Company as the contractor. Part of the building was constructed on the southernmost twenty-five feet of Seaboard Yard (sometimes called "Upper Wall Street") and part of the building upon property that was deeded to Atlanta Newspapers, Inc. by the City of Atlanta in exchange for other real property. Plaintiff occupies a portion of premises located on another street more than a block away from the construction area. These premises do not abut the construction area and are accessible by alternate routes, some of which do not lead near the construction area. At the hearing on the original complaint, Atlanta Newspapers, Inc. showed that it was the successor in interest to Seaboard Airline Railroad Company to the southernmost twenty-five foot area of "Upper Wall Street", and showed by documents and other evidence that Seaboard had owned the fee interest in that property. See *Seaboard Air-line Ry. Co. v. Greenfield*, 160 Ga. 407, 128 S.E. 430 (1925). Defendants further showed that all permanent construction occurred in said southernmost twenty-five foot area, and that the area was not a public street or highway. The defendants showed that pursuant to charter authority granted by the state legislature, the Mayor and Board of Aldermen of the City of Atlanta had authorized an exchange of real estate with Atlanta Newspapers, Inc. that would result in the widening of Fairlie Street and be advantageous to the City of Atlanta; that an exchange was made pursuant to such authority; and that construction of the building was taking place only in the portion

of what formerly was Fairlie Street that had been deeded to Atlanta Newspapers, Inc. pursuant to such authority. Further, defendants showed that public announcement had been made of the proposed construction on June 23, 1968, and that during the period from that date until the suit was brought (March 18, 1969), Atlanta Newspapers, Inc. had spent approximately $2,200,000.00 in the construction of the building. It was shown that the defendants had the proper building permits and the permission of the City of Atlanta to construct the building. After a hearing which continued over several days, and at which numerous documents, photographs, and affidavits were considered, as well as oral testimony, the trial court granted summary judgment to the defendants and dismissed the action.

The plaintiff appealed from the judgment of the trial court, and at this point the circumstances directly pertinent to the petition before this Court commenced. Although the plaintiff had filed a Notice of Appeal on May 1, 1969, the appeal still had not been perfected one year thereafter, and the defendants moved the trial court to dismiss the appeal pursuant to Section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; Ga. Code Ann. §6-809(b)), asserting that there was an unreasonable and inexcusable delay in the filing of the transcript and that the delay was caused by the plaintiff. Subsequent to the filing of this motion, but before the hearing, the appeal was docketed in the Supreme Court of Georgia. At the hearing before the trial court on the motion, defendants showed that thirteen months had elapsed between the judgment of the trial court and the filing of the transcript on May 7, 1970; and showed that plaintiff did not order any type of transcript until August

or September, 1969, when the objections to evidence were explained; that the entire transcript was not ordered until November, 1969; that the documentary evidence was not requested until April 1970, and that approximately $12,000,000.00 had been expended by the defendants on construction during this period of delay. The trial court found that the delay in filing the transcript was unreasonable and inexcusable and caused by the plaintiff but denied the motion of defendants on the ground that the appeal had been docketed in the Supreme Court of Georgia. These defendants appealed to the Supreme Court of Georgia from this latter ruling, and in this appeal the Supreme Court of Georgia reversed the trial court and ordered the trial court to dismiss the appeal taken by the plaintiff.

SUMMARY OF ARGUMENT

I. The Supreme Court of Georgia decided an issue of Georgia law in accordance with the applicable law of the state and there is no contention to the contrary in the petition for certiorari.

II. No question of federal law was involved in either decision of the Supreme Court of Georgia.

III. The alleged reasons for granting the writ stated in the petition for certiorari are totally insufficient to call for review by this Court.

IV. Although the Supreme Court of Georgia correctly decided the cases on the grounds stated in its opinions, the decisions were correct on several independent grounds, without regard to the question sought to be raised by the petition for certiorari.

ARGUMENT

I.

The Supreme Court of Georgia Decided an Issue of Georgia Law in Accordance with the Applicable Law of the State and There Is No Contention to the Contrary in the Petition for Certiorari.

The Supreme Court of Georgia decided a question of state law in accordance with the applicable law of the state. Section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; Ga. Code Ann. §6-809(b)), provides in pertinent part as follows:

> ". . . the trial court may, after notice and opportunity for hearing, order that the appeal be dismissed where there has been an unreasonable delay in the filing of such transcript and it is shown that the delay was inexcusable and caused by such party; . . . ."

Since the trial court in this case had specifically found that the delay in filing the transcript was unreasonable, inexcusable and caused by the plaintiff, the Supreme Court of Georgia held that, pursuant to the statute quoted above, the appeal of plaintiff should have been dismissed. As can be seen from the petition in this case, plaintiff is attempting to relitigate in this Court issues relating to the merits of the injunction proceeding which were allegedly involved in the dismissed appeal. The issue decided by the Supreme Court of Georgia related solely to state appellate procedure, and involved only the question of whether a thirteen-month delay in perfecting an appeal should cause such appeal to be dis-

missed under applicable state law. Although the plaintiff quarrels with the findings of the trial court relative to the cause of the delay in the filing of the transcript, plaintiff does not contend in its petition for certiorari that the Supreme Court of Georgia improperly applied the Georgia statute in question to such factual findings.

II.

No Question of Federal Law Was Involved in Either Decision of the Supreme Court of Georgia.

Plaintiff did not make any constitutional attack at the trial level upon the validity of the Georgia statute applied by the Supreme Court of Georgia (Ga. Code Ann. §6-809(b)), nor with respect to its application under the circumstances of this case. Because such questions were not raised, no court below passed on such questions. For this reason, plaintiff was unable to comply, and did not comply with Rule 23(f) of this Court, which requires the petitioner to specifically set out the stage in the proceedings at which and the manner in which the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The Court has held that when the highest state court has failed to pass upon the federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, and that if it was not presented to state courts in such manner that it was necessarily decided by the highest state court, this Court would have no power to consider the issue. *Street v. New York*, 394 U. S. 576, 582 (1969).

A petitioner must follow the state procedures in rais-

ing the federal question, and failure to do so proves fatal for review in this Court. See *Ferguson v. Georgia*, 365 U. S. 570, 572 (1961). When required by state practice, the federal question must be raised before the trial court, and it must be presented to the trial court at the appropriate time and in the appropriate manner. "A state procedural rule which forbids the raising of federal questions at late stages of the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." *Williams v. Georgia*, 349 U. S. 375, 382-83 (1955). The Georgia appellate courts will not consider a constitutional attack made for the first time on appeal, and not properly raised below. *Kohl v. Manning*, 223 Ga. 755, 158 S.E. 2d 375 (1967); and *Law v. State*, 219 Ga. 383, 134 S.E. 2d 776 (1964), where the court stated: "Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review." If reasonable state procedural requirements are not observed, this Court will decline to exercise jurisdiction. And when the highest state court is completely silent on the federal question, this Court will assume, unless it is affirmatively shown otherwise, that the silence is due to the procedural deficiency. See *Bailey v. Anderson*, 326 U. S. 203, 206-7 (1945). Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless the court actually entertains the petition and expressly decides the question. See, e.g., *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 128 (1945). To be considered a reviewable judgment under such circumstances, the order denying the peti-

tion for rehearing must be more than a cursory statement that the petition has been fully or materially considered and accordingly is denied. See *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U. S. 326, 333-34 (1913).

III.

The Alleged Reasons for Granting the Writ Stated in the Petition for Certiorari Are Totally Insufficient to Call for Review by This Court.

Plaintiff (on page 3 of its petition) asserts that it seeks a writ of certiorari under the provision of 28 U.S.C. §1257(3) which permits review by certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." It also alleges that this Court should issue the writ since the Georgia courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This latter basis for a writ, however, relates only to federal courts of appeals. See Rule 19(1)(b) of this Court.

Plaintiff has not set up any title, right, privilege or immunity under the Constitution. As stated above, at no point below did plaintiff properly raise a constitutional question, and no court below passed upon any constitutional question or other question of federal law. Had the plaintiff properly raised such issues, however, the judgments below would not be subject to constitutional attack.

All systems of appellate procedure with which we are familiar require the appellant to exercise some degree of diligence in perfecting an appeal. Indeed one of the aims of our legal system is that litigation should be concluded

with at least minimal promptness. The instant case furnishes an excellent example. The trial court in its judgment had determined that the defendants were entitled to proceed with the construction of their building. During the thirteen months that elapsed before plaintiff caused the transcript to be filed, the defendants had completed all construction of the building except for certain finish items. It would have been grossly unfair to permit the plaintiff to delay until that point to obtain review of the trial court's decision.

The Georgia procedure under which plaintiff's appeal was dismissed is in no way unique. For example, Rule 12(c) of the Federal Rules of Appellate Procedure provides for the dismissal of an appeal where the appellant has failed to cause timely transmission of the record. See, e.g., *Tucker Products Corp. v. Helms*, 171 F.2d 126 (9th Cir., 1949), cert. den. 336 U. S. 938 (1949).

Defendants do not dispute the rule set out in *Rinaldi v. Yeager*, 384 U. S. 305 (1966), where this Court stated at page 310:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

There is no showing whatsoever that any one comparably situated with the plaintiff has been treated differently. In applying the Georgia statute which provides for dismissal when the appellant inexcusably causes an unreasonable delay in perfecting the appeal, the Supreme Court of Georgia was not discriminating against the

plaintiff. This is not a case, for example, where an appellant was refused an appeal because of indigency. Cf. *Griffin v. People of Illinois*, 351 U. S. 12 (1956); *Draper v. State of Washington*, 372 U. S. 487 (1963). Here, the appellant *inexcusably* delayed the perfection of its own appeal for thirteen months. Cf. *Griffin v. People of Illinois, supra*, at page 16: "There is no contention that petitioners were dilatory in their efforts to get appellate review. . . ." The Georgia statute applies to all persons of every class who would appeal to the appellate courts of the state.

Although the petition is not entirely clear, it appears that petitioner contends that it has a constitutional right to an appeal which is not subject to state-created conditions. It has been recognized many times by this Court that no such right exists. See, *e.g.*, *McKane v. Durston*, 153 U. S. 684 (1894); *James v. Appel*, 192 U. S. 129, 137 (1904); *Standard Oil Co. v. Missouri*, 224 U. S. 270, 286 (1912); *Baldwin v. Traveling Men's Ass'n*, 283 U. S. 522, 524 (1931).

Plaintiff lost its case at the trial level and waited thirteen months before perfecting its appeal. It is attempting to relitigate the merits of its complaint in this case by alleging constitutional infirmity in the state appellate procedure. It is settled that the Fourteenth Amendment has not transformed this Court into a court of general review to which questions of general justice or equitable considerations arising out of the alleged takings of property may be brought for final determination. *Tracy v. Ginzberg*, 205 U. S. 170 (1907); *Allen v. Georgia*, 166 U. S. 138, 140 (1897). Contrary to the protestations in the petition, the fact that one loses his case does not show

a denial of equal protection of the laws. See *Sexton v. Barry*, 233 F.2d 220 (6th Cir., 1956), cert. den. 352 U. S. 870 (1956).

IV.

Although the Supreme Court of Georgia Correctly Decided the Cases on the Grounds Stated in Its Opinions, the Decisions Were Correct on Several Independent Grounds, Without Regard to the Question Sought to be Raised by the Petition for Certiorari.

A. *Plaintiff was guilty of such laches in prosecuting its appeal to require dismissal by the Supreme Court of Georgia.*

Plaintiff waited thirteen months before perfecting its appeal. In *George v. American Credit Control, Inc.*, 222 Ga. 512, 150 S.E. 2d 683 (1966), the appeal was dismissed where a failure to pay costs caused a delay of seventy days, the court stating at page 513: "[j]ustice delayed is often justice denied. This court seeks to uphold the laws and expedite its hearings and to make certain the administration of justice without delay. We must continue to conform to this practice. . . . This court will not consider this appeal which represents a stale one caused by the laches of the appellant, and it is dismissed under the authority of the Constitution (Code Ann. §2-3705), the laws and past decisions and Rule 8 of this court."

If a delay of seventy days causes an appeal to be stale, and if the appellant in such circumstances is guilty of laches, then certainly the plaintiff in this case was guilty

of laches where it delayed perfecting its appeal for more than one year.

B. *The appeal was properly dismissable on the ground that the questions presented had been rendered moot.*

Ga. Code Ann. §6-809(b) provides that appeals shall be dismissed where the questions presented have become moot. The complaint filed by the plaintiff sought to enjoin the construction of a certain building by the defendants. Defendants submitted with their motion to dismiss the appeal in the Supreme Court, an affidavit of Mr. Donald L. Davis, Project Manager for the defendant Batson-Cook Company, stating that the building had been completed, and all construction in the area of the two alleged streets had been accomplished. This was also shown in the affidavit of Mr. William I. Ray, Jr., similarly submitted. Where the act sought to be enjoined has been completed by the time the appeal is perfected, the Georgia courts will dismiss the appeal on the ground of mootness. See *Newman v. Smith*, 217 Ga. 465, 123 S.E. 2d 305 (1961); *Sav-A-Stop, Inc. v. Rich*, 224 Ga. 354, 162 S.E. 2d 318 (1968); *Trimble v. Commissioners of Roads & Revenues of Troup County*, 167 Ga. 52, 144 S.E. 771 (1928); *Davison v. City of Summerville*, 204 Ga. 748, 51 S.E. 2d 820 (1949).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 15, 1971

CERTIFICATE OF SERVICE

The undersigned attorney for these Respondents hereby certifies that copies of the foregoing Brief for Respondents Cox Enterprises, Inc. and Atlanta Newspapers, Inc. in Opposition to Petition for Certiorari have been served upon counsel of record for the Petitioner and for the remaining Respondents by depositing the same in a United States mail box, with first class postage prepaid, respectively addressed to such counsel of record at their post office addresses, as follows:

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APPENDIX I

26026. COX ENTERPRISES, INC. et al. v. SOUTHLAND, INC.

The trial court should have dismissed the appeal in *Southland, Inc. v. Cox Enterprises, Inc.*, 226 Ga. 798, because of the unreasonable delay in filing the transcript of evidence and proceedings.

ARGUED SEPTEMBER 17, 1970—DECIDED OCTOBER 8, 1970—REHEARING DENIED OCTOBER 22, 1970.

Injunction. Fulton Superior Court. Before Judge McKenzie.

Hansell, Post, Brandon & Dorsey, Allen Post, Albert G. Norman, Jr., Charles T. Zink, for appellants.

G. Seals Aiken, F. L. Breen, Henry L. Bowden, Martin McFarland, Glover & Davis, J. L. Glover, for appellee.

GRICE, Justice. For decision here is whether an appeal should have been dismissed upon the ground of unreasonable and inexcusable delay in the filing of the transcript of evidence and proceedings.

This issue arose after the grant of summary judgments for the defendants in an action filed in the Superior Court of Fulton County by Southland, Inc., against Cox Enterprises, Inc., the City of Atlanta, and Benson-Cook Co., seeking injunctive relief against continuance of an alleged obstruction of two streets by construction of a multi-story building. Atlanta Newspapers, Inc., was later named as a defendant.

Upon grant of the summary judgments, the plaintiff on May 1, 1969, filed a notice of appeal.

On May 8, 1970, before the appeal had been docketed

in this court, two of the defendants filed in the trial court their motion to dismiss the appeal. The motion was based upon Section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; *Code Ann.* §6-809(b)) and asserted that there was an unreasonable and inexcusable delay in the filing of the transcript and that the delay was caused by the plaintiff. The motion alleged that 13 months had elapsed between the judgments of the trial court and the filing of the transcript on May 7, 1970, and that during that time the defendants had expended large sums of money in constructing the building.

The trial court on May 20, 1970, after the appeal had been docketed in this court on May 12, 1970 (Case No. 25917), entered an order on the motion to dismiss, in which it found that "the delay in filing the transcript in this case was unreasonable and inexcusable and that this delay was caused by the . . . [plaintiff's] failure to decide to order the transcript as a whole until the fall of 1969."

This order further recited: "This court, however, recognizes the danger inherent in any statute which permits a trial court to dismiss an appeal of its own rulings. In view of this and the fact that movants failed to object to the order of extensions previously granted as well as the fact that said case has now been docketed in the Supreme Court and assigned for argument, this court denies the motion to dismiss the appeal.

"However, it is ordered that a transcript be made of this proceeding and this supplemental transcript be forwarded to the Supreme Court of Georgia as a part of the record in this case for determination as to whether or not the appeal should be dismissed."

This appeal is from that judgment, which was certified for immediate review.

1. The evidence adduced before the trial court on the motions to dismiss the appeal, while in conflict, amply supported such finding of delay caused by the plaintiff.

The court reporter testified that it was not until August or September, 1969, that the plaintiff, or anyone on its behalf, ordered any kind of transcript; that in August or September of 1969, the plaintiff's president requested that the reporter type the objections to the evidence, and they were delivered to him in early October; that it was not until November 10, 1969, that the plaintiff's president ordered a transcript of all of the evidence and proceedings; and on December 11, 1969, such transcript was delivered to plaintiff's attorney; and that in late April or early May 1970, the plaintiff's president requested the reporter to obtain the original documentary evidence, and it was delivered to him that same day.

The project manager of the defendant contractor testified that between the date of the original hearing in the case and the hearing on the motion to dismiss, 75% of the construction had been completed, leaving only the finish items.

The vice president of the defendant Atlanta Newspapers, Inc., testified as to the large financial outlay for the building during each of the 12 months that had ensued since the filing of the notice of appeal.

2. The trial court having found that the delay in filing the transcript was unreasonable, inexcusable and caused by the plaintiff and such finding being supported by the evidence upon the hearing, it should have dismissed the appeal.

Since that court did not enter a dismissal, this court will do so.

As we appraise the salient factors, the lapse of time from the notice of appeal on May 1, 1969, to the filing of the transcript on May 7, 1970, under the circumstances referred to above, constitutes a stale appeal.

Although a 1968 amendment (Ga. L. 1968, p. 1072; *Code Ann.* §6-809(b)) to the Appellate Practice Act provides that the trial courts, rather than the appellate courts, may dismiss appeals for failure of a party to file the transcript within the proper time, this court has held that such amendment does not change the responsibility of this court under the Constitution (Art. VI, Sec. II, Par. V; *Code Ann.* §2-3705), and that this court will dismiss a stale appeal. See in this connection, *Fahrig v. Garrett*, 224 Ga. 817 (165 SE 2d 126).

(a) Furthermore, under the circumstances shown here dismissal cannot be avoided because of the successive extensions which the plaintiff obtained from judges of the trial court.

There is nothing in our statutes or decisions which requires that the obtaining of extensions per se excuses an appellant from the consequences of his own unreasonable delay.

This court in *Rogers v. McDonald*, 226 Ga. 329 (175 S.E. 2d 25) recognized that the obtaining of extensions is not conclusive on the issue of delay by the appellant in filing the transcript. In that case several successive extensions had been granted and the appellee sought to have the trial court set aside the extensions as an abuse of judicial discretion under the facts appearing there. The trial court conducted a hearing at which full evidence

was presented on the issue as to unreasonable delay and found that under the facts there was no cause to set aside the extensions. This court affirmed, stating that *it was not shown that the appellant was in any way responsible* for the length of time being taken by the reporter to prepare the transcript.

(b) The fact that the defendants did not object to the grant of the extensions does not bar them from moving to dismiss the appeal.

Each of the extensions presented to the trial judge for his approval recited that an additional number of days "will be required in which to prepare the record on appeal. . . ."

There is nothing which shows that the defendants knew that notwithstanding the plaintiff's claim that additional time was required, any such need was due to his own delay in ordering the transcript. Under the Appellate Practice Act (Ga. L. 1965, pp. 18, 21; *Code Ann.* §6-804) the grant of such extensions may be ex parte.

For the foregoing reasons the judgment in the instant case is

Reversed. All the Justices concur.

APPENDIX II

25917. SOUTHLAND, INC. v. COX ENTERPRISES, INC. et al.

GRICE, Justice. This case is controlled by *Cox Enterprises, Inc. v. Southland, Inc.*, 226 Ga. 794.

Appeal dismissed. All the Justices concur.

ARGUED JULY 15, 1970—DECIDED OCTOBER 8, 1970—REHEARING DENIED OCTOBER 22, 1970.

Injunction. Fulton Superior Court. Before Judge McKenzie.

G. Seals Aiken, F. L. Breen, for appellant.

Allen Post, Charles T. Zink, Albert G. Norman, Jr., William G. Grant, Henry L. Bowden, Martin McFarland, J. L. Glover, for appellees.